THE SURPLUS INCOME OF A LUNATIC.

A PART of the ancient jurisdiction of the Chancellor concerns the care of the persons and estates of persons of unsound mind.[1] In the course of the exercise of this parental

[1] Whether it existed at common law or no is perhaps a purely academic question. It appears to have been first definitely formulated in the Statute of Prerogatives, 17 E. II. chs. ix. and x. Chapter ix. of that statute gave the king the beneficial interest in the land of idiots, limited only by the duty of finding them "their necessaries." For a collection of the authorities on this point, see Pope's Law of Lunacy, p. 20, note (8); also Collinson on Lunacy, vol. i. p. 94. Chapter x. is more important, as containing a suggestion of the lines upon which the law in relation to both classes — lunatics and idiots — was at a later period laid down by the Lord Chancellors. It has been suggested to us that lunacy jurisdiction being prerogative rather than equitable, may not exist except by statute in some of the States; and that, the statute not conferring the special jurisdiction to be discussed in this article, difficulty might therefore be found in its exercise. In Kentucky (Nailor *v.* Nailor, 4 Dana, 339); Maryland (Corrie's case, 2 Bland Ch. 467); North Carolina (Latham *v.* Wiswell, 2 Ired. Eq. 294); Illinois (Dodge *v.* Cole, 97 Ill. 338); and Indiana (McCord *v.* Ochiltree, 8 Blackf. 15), it has been held that full lunacy jurisdiction exists in American Chancery Courts. Cf. in New York Brashen *v.* Van Cortlandt, 2 Johns. Ch. 264, 402; *contra*, Oakley *v.* Long, 10 Humph. (Tenn.) 254. Where all jurisdictions are merged one would imagine that this jurisdiction could be taken without difficulty, on the ground stated in the cases above. In Massachusetts, where the lunacy jurisdiction is in the Probate Courts (P. S. ch. 139, especially §§ 29–34), the statute which would regulate this matter (§§ 30 ff.) is a mere paraphrase of the 17 Edw. II. ch. x., (1 Pick. Statutes, 381,) which gives the king this jurisdiction; and although arguments against such jurisdiction might be drawn from subsequent provisions of the Massachusetts Statute, §§ 33, 34, they would not be in the least as strong as the provision of 17 Edw. II. ch. x., that "the Residue beside their Sustentation shall be kept to their use," which is omitted in Massachusetts. In this connection the forcible remarks of Holmes, J., in Minot *v.* Baker, 147 Mass. 348, where a similar objection was raised, are in point. "The objections . . . to the jurisdiction are purely historical . . . that although in England there was a remedy existing alongside of the ordinary jurisdiction of the Chancellor, and practically reaching similar results, yet since this court has not the powers exercised by the sign manual, a will must be defeated and a trust must fail. . . . If it is possible to avoid such a result it is desirable to do so." So in lunacy jurisdiction, it is desirable, if possible, to avoid a result which will leave the strongest moral duties unperformed.

Fitzherbert's definition of the term "idiot," or "idiota," as paraphrased by Stauneforde [Pr. Reg. 34], is quaint enough to be worth inserting here: "And the maner of the tryall of hym to bee a foole naturall appeares in the sayd *Natura Breuium*, fol. 233; that is to say, yf hee cannot tell to twenty pence, or tell his age, or who was his father and mother, or such lyke thinges whereby it may appeare that he hath no kynd of understandinge in that that is eyther for his profite or dammage. But if hee bee learned and apt to learne then is hee no ideot, as Maister Fitzherbert there thinkes, and *Grene* sayeth in *Saver de Default*, that if hee bee able to beegette eyther sonne or daughter hee is no foole naturall." Grene, later C. J. of K. B., is the "Seigneur Grene, le Sage Justice" cited with respect by Thirning, C. J. (Bellewe, 142).

authority an interesting question has occasionally arisen which it is the purpose of this article to discuss, namely, what disposition is to be made of the surplus income of the lunatic remaining after every reasonable and proper expenditure has been made for his care and comfort?

There are only a few reported cases in English jurisdictions, and scarcely any in the United States, defining the circumstances under which the guardian of a lunatic may spend a portion of his ward's income for objects not directly connected with the ward's maintenance. These cases announce with more or less clearness a tolerably definite principle, though in a few the principle seems to have been wrongly applied. In emphasizing one proposition all the authorities are agreed. That proposition is, that before any portion of his income can be devoted to other purposes, the ward himself must be provided with every comfort that he requires or to which he has been accustomed. There must be no economizing for the purpose of making an allowance to needy relatives, or in order to save something for the next of kin.[1] But when the ward has been liberally provided for, if there is still a surplus of income, allowances may, under certain circumstances, be made to the lunatic's relatives and to certain other persons.

I.

The only principle that can produce coherency or consistency in making such allowances is the principle laid down by Lord Eldon, in *Ex parte* Whitbread, 2 Mer. 99. Although it has not always been squarely followed by the courts, that principle, it is submitted, is this. Where there is no evidence of any settled intention of the lunatic before his insanity in regard to the matter, or of any intention formed during his rational moments, the court will presume that were the lunatic sane he would act in the matter as any reasonable and ordinarily generous man would act under the same circumstances. In none of the cases, not even in those where the court professes to make "what the lunatic himself would do if he were sane," the *ratio decidendi*, is any account taken of the idiosyncrasies of the lunatic, that is to say

[1] See remarks of Lord Eldon in Oxenden *v.* Lord Compton, 2 Ves. p. 69, 1793, and in *Ex parte* Whitbread, 2 Merivale, 99, 1816, and of Ames, J., May *v.* May, 109 Mass. at page 256, 1872.

whether he was extravagant or careful, liberal or mean. Unless it can be shown that there is some special reason why the lunatic would not, if he were sane, assist the particular applicants in question, the court will dispose of his surplus property in accordance with the views of a reasonable and ordinarily liberal man, though such views would never be entertained by the lunatic if he were sane. The courts will not hear evidence on the question how a miser or a spendthrift, if he were sane, would dispose of his surplus income.

We proceed to trace the applications of the principle indicated above in the reported cases. The earliest adjudication on the subject appears to be an order of Lord Thurlow's in *Re* Cotton. There is no complete report of the case. The only information to be had about it is contained in a reporter's note to *Ex parte* Whitbread, where the order is merely said to have overruled an objection to a Master's report allowing maintenance from the lunatic's income to his relations generally, "without specifying the proportions which were meant to be granted to the relations respectively." The Chancellor's reasons are not stated. And all trace of this case seems to have been lost; for in 1 Collinson on Lunacy, 246, in 1812, it is said: "When any of the relations of a non-compos are dependent on him, whom he is bound to provide for according to the claims of nature, though not in law, and for whom he provided when of sound mind, the Chancellor cannot direct a specific allowance for their support, but their expenses will be included in the general charges of the establishment, and the maintenance of the non-compos regulated accordingly."

The next case, which is the leading English case on the subject, is *Ex parte* Whitbread, in the Matter of Hinde, 2 Mer. 99, 1816. The case came before Lord Eldon, on objections to a Master's report, the grievance being the smallness of the proportion of the lunatic's surplus income allowed to the petitioner, a niece of the lunatic. The facts are very obscurely stated. No order was made on the petition, but the Chancellor discussed somewhat at length the principle on which such allowances are made. His language at first seems to make the test question, What would *this* lunatic do if he were sane? . . . "The court," says he, (p. 100), "looking at what it is likely the lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons" [the relatives]. But the next sentence of the opinion shows that the test that Lord Eldon intended to lay down

is not what the particular lunatic with whose estate he is dealing would have done if he had been sane, but what any reasonable man of the same condition in life with the lunatic would do under the circumstances. He says, "So where a large property devolves upon an elder son who is a lunatic, as heir-at-law, and his brothers and sisters are slenderly or not at all provided for, the court will make an allowance to the latter for the sake of the former; upon the principle that it would naturally be more agreeable to the lunatic, and more to his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars." Thus it is what would "naturally" be more agreeable to the lunatic, that the court considers; that is, what would be agreeable to the normal man, with average notions of obligations to relatives and to society, and not what would be agreeable to a man who is what this lunatic was before his insanity.[1]

Such then is Lord Eldon's rule. In the later English cases the expressions used by him are retained. But in almost all the cases it is clear that the sole test and sole limitation is that of the normal sane person in like circumstances. As the cases are very few and indicate interestingly the development of the principle, we proceed to consider them at some length. The order is chronological.

Two interesting classes of cases are omitted as not directly in point.

(A.) Those cases where the expenditure purports to have been upon the lunatic himself. It is obvious that a court can go far in allowing an infant or a lunatic to maintain a large establishment for the sake of the support of a family of brothers and sisters, upon the ground that such is really the best way to spend the ward's money upon himself. For instance, in Wellesley *v.* Duke of Beaufort, 2 Russ. 1, 1827, at p. 28, Lord Eldon says: "In many great families the eldest infant is in possession of a large property; the younger infants have some little property; and in such a case the court does not measure the duty of maintaining the eldest child

[1] Indeed, the latter test would fail utterly in many cases where the facts were scanty. For instance, the lunacy might have been congenital, and a court could scarcely go into the question of heredity. And so also where the insanity was gradual, it would he difficult and dangerous to endeavor to distinguish sane characteristics from generosity or meanness which were really symptoms of the approaching disease. This danger especially furnishes a strong argument for the more general test laid down by Lord Eldon.

by looking at him only. And it considers that it is for his interest that his brothers and sisters should be brought up in respectable stations; " and he goes on: "We will go the length of giving them maintenance out of his provision as a part of the maintenance made for him, though to be applied to them."

And so in *Re* Weld, 20 Ch. D. at 457, (C. A.) 1882, Jessel, M. R., speaking of "an allowance without account made by the court to a person in a fiduciary position," says: "The purpose for which the allowance is made is defined, and there are no doubt many cases, especially in the Chancery Division [as opposed to Lunacy], where such an allowance is purposely made larger than is wanted for the purpose named, with the object of indirectly benefiting the person to whom the allowance is made, the court having no jurisdiction to benefit that person directly. A very common instance is the case of a man of large fortune leaving an infant eldest son, who takes the great bulk of his property, but leaving an insufficient provision for his widow and younger children. . . . When such an allowance is made of course no account is asked for, so long as the establishment is kept up and the children are properly maintained." And a little farther on he speaks of seeing that "the school bills of the children" are paid, showing that the court acts on the assumption that its allowance is *not* to the ward.

To this class also belong cases where the legal duty of the ward, *e. g.* to support his wife and family,[1] is liberally performed by the court for him.[2]

It is evident that this class of cases sometimes, as in *Re* Weld itself, presents the singular and unpleasant spectacle of a court attempting to cheat itself, and to do indirectly without limit, what

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[1] The Statute of Prerogatives, upon which jurisdiction in Lunacy substantially depends, requires the expenditure of the lunatic's income not only upon his maintenance but upon that of his *family*. For a definition of family, as used in statutes, see the remarks of Kenyon, C. J., in Rex *v.* Darlington, 7 T. R. 797 (1792); Woodworth *v.* Comstock, 10 Allen, 425 (1865), authorities in 7 Am. & Eng. Enc. of Law, 803, and the law dictionaries, such as Bouvier. The interpretation of the word in *wills* is to be distinguished.

[2] This class comprises the following cases among others (the list is not intended to be exhaustive): Bird *v.* Lefevre, 4 Bro. C. C. 100 (1792) (Income of paralytic imbecile paid to wife for maintenance of family); Conduit *v.* Soane, *Re* Gandy, 5 Myl. & C. 111 (1840); Nettleshipp *v.* Nettleshipp, 10 Sim. 236 (1839) (Husband and wife, maintenance); Edwards *v.* Abrey, 2 Ph. 37 (1846) (Husband and wife). S. C. 15 L. J. N. S. Ch. 404, and 10 Jur. 650 (the reports differ materially). *Re* Senate Resolution, 21 Pac. Rep. 485 (Colo. Allowance to wife). *Re* Leach, 12 So. 126 (La.); Hallett *v.* Hallett, 34 N. E. 740 (Ind.).

it is the purpose of this article to show may be done directly within certain safe limits. One would think that a court would not rest easy in granting an allowance for the use of A, which it may do, to be spent for the use of B, which it says is wrong; and yet it winks at B's profit, and (20 Ch. D. at 457-58) takes away the allowance when B's bills are not paid.

(B.) Those cases where the court carries out for the lunatic definite enterprises begun or planned before his incapacity. Here also the considerations which furnish the *ratio decidendi* for the principal class of cases under discussion often effect and increase the liberality with which the court carries out the ward's wishes.[1]

"We often," said Cotton, L. J., in *Re* Whitaker, L. R. 42 Ch. D. at 126, "give out of the personal estate of a lunatic that which is mere bounty. That generally occurs in the case of charities where the lunatic has himself, while he was of sound mind, supported institutions of a charitable nature."

II.

The first reported case after *Ex parte* Whitbread is —

1828. *Ex parte* Haycock, 5 Russ. 154.

This was a petition presented by the committee praying a reference to the Master, to approve of a proper allowance for four illegitimate children of the lunatic and for their mother.[2] The Lord

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[1] This class comprises the following cases among others: *Re* Frost, L. R. 5 Ch. App. 699 (1870), *Re* Jodrell, Shelford on Lunacy, 161 (1828); *Re* Mackenzie, 43 L. T. 681 (1880); Hambleton's Appeal, 102 Pa. State, 50 (1883). In this case an old man without children, having a large estate, took his nephew and the nephew's family to live with him, paying all the expenses of the establishment and a salary to the nephew. Gordon, C. J., for the court, said that there was every reason for continuing the arrangement the lunatic had made when sane. Halsey's Appeal, 13 Atl. R. 934 (1888). Here the inquisition of lunacy found A, B, C and D to be the wife and three children of the lunatic, and the lunatic's property was applied for their benefit accordingly. The real and prior wife and a son by her turned up and made claim. Gordon, C. J., citing Hambleton's Appeal, said that the court would at any rate have ordered "the committee to provide for the lunatic and the family which he then (*i. e.* at the time of inquisition found) had about him." *Re* Strickland, L. R. 6 Ch. App. 226 (1871); *Re* Heney, 2 Barb. Ch. 326 (1847). So *Re* Whitaker, *supra*, may by some be considered to belong here.

[2] In argument two unreported cases were cited, *Ex parte* Galpin, "in which a gross sum had been allowed for the benefit of illegitimate children" (out of income?); and *Ex parte* Spurrell, in which a yearly sum had been appropriated for their maintenance.

Chancellor Lyndhurst made the reference prayed, for the allowance to the children, but "declined to extend the order to their mother."

1830. *Re* Freak. Shelford on Lunacy, 160.

In this case the income of the lunatic was divided, $\frac{15}{32}$ going to four married children and the children of a deceased child. The report states merely the facts, but the context in Shelford indicates that the practice had become well established at this date.

1831. *Re* Windsor. Shelford on Lunacy, 159.

Here the lunatic, with a surplus income of £800, was tenant for life, remainder to petitioner — a child of eight — who was being supported out of his mother's income of £40. It appearing that "the lunatic was every other day capable of expressing his wishes as to the application of his property, Lord Chancellor Brougham, although he recognized the doctrine of Lord Eldon, . . . refused to make the order prayed."

Clearly it is no part of the law to do for the lunatic what he can do for himself, as this man could.

1836. *Re* Drummond, 1 My. & Cr. 627.

Here out of a total income of £5500, and a surplus income of £5000, £2000 had been appropriated to the support of the petitioners — two daughters of the lunatic — and for the keeping up of his house and establishment for them. One of the daughters being about to marry, the Master certified that a proper rearrangement of the income would be made by allowing £1500 per annum for the unmarried daughter and the establishment, and £1000 down by way of advance, and £1000 per annum to the daughter about to marry. The Lord Chancellor (Cottenham) allowed the report, directing "that the sum allowed for the maintenance [of the daughter about to marry] should be settled to her separate use."

This case and the three cases in the note[1] may perhaps be considered instances of the legal obligation to support the immediate family of the lunatic (cf. Viner's Abr. Tit. Ideot); but it is clear that in supplying an annual income to daughters who marry off, the court goes somewhat beyond that, for they are then no longer part of the lunatic's family. Rex *v.* Darlington, 7 T. R. 797.

1836. In the matter of Blair, 1 Myl. & Cr. 300; S. C. 5 L. J. N. S. Ch. 150.[2]

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[1] *Re* Baker (1830); *Re* Craven (1830); *Re* Goldsmid (1835), — three similar unreported cases, — are mentioned in a note to this case.

[2] There is some head-note law in the L. J. report.

Here the lunatic had an income much greater than was necessary to support her comfortably. One of her nephews, an adult, had an income of £300 per annum; the other, a clergyman, had £288 per annum. Yet the Lord Chancellor (Cottenham) allowed each of the nephews £150 a year out of the lunatic's estate. The nephews were next in remainder to the lunatic under a family settlement. The court cited *Ex parte* Whitbread, saying that such cases were to be treated with the greatest caution. Nothing was said about treating the allowances as advances, possibly because the beneficiaries were practically the only persons entitled in remainder.

1838. *Re* Creagh, 1 Dr. & Wals. (Irish Ch.) 323.

In 1793 R. C. was found a lunatic. Out of his income of £2500 he had been cared for, and all incumbrances on his estate paid off. His maintenance had been £400 per annum, and the Master found that he was incapable of receiving additional comfort. After several references to a Master to inquire into the circumstances of the nephews and nieces, next of kin, the question came on before Plunket, L. C., of confirming a report recommending allowances of £100 to each of seven nephews and nieces who were either "possessed of small properties subject to incumbrances, which if called in would swallow up" everything, or were totally without means. The order was made accordingly.

The excellent argument for the petitioner relied upon the test of *Ex parte* Whitbread, *supra*, and apparently the order was confirmed upon that ground, for there is no opinion.

1840. *Re* Earl of Carysfort, Cr. & Ph. 76.

Here the lunatic's income was £10,000, his surplus income £8400. John Wright had lived with the lunatic as personal servant from 1817, when the commission issued, to 1840, when, his "age and infirmities having rendered him incapable of giving that attention to the lunatic which his malady required," the committee proposed a pension of £60. The Master submitted the question to the judgment of the Lord Chancellor (Cottenham). The next of kin consented. The Lord Chancellor thought the proposal "very reasonable," but asked for precedents; none were furnished, but it appearing that the committee "were satisfied that the allowance was one which the lunatic, if he should ever recover, would approve, the Lord Chancellor made the order."

This illustrates the way in which the true principle is confused by the incorrect habit of judging what the special lunatic would

do. Here two hypotheses are possible: (*a*) That the committee knowing the circumstances report that a reasonable man would pension such a servant. No one would quarrel with such a result, and that seems on the whole to be what was meant. (*b*) That the committee, knowing that the lunatic when sane was exceptionally generous, think that he would make an allowance here, although the ordinary man would not. That, it is submitted, would be wrong.

Note that the case effectually disposes of any notion that this is a right of relatives, a kind of prior enjoyment of their inheritance, like Henry V.'s experiments with his father's crown, — a corollary, as it were, to their right as next in succession. Here the beneficiary was in no way of kin to the lunatic. For the same reason it was obviously impossible that the allowance should be treated as an advancement.

1842. *Ex parte* Fowler, 6 Jur. 431.

This was a petition of the committee upon the marriage of the only daughter of the lunatic, praying a reference to the Master of the question of an allowance for her outfit and an additional annual allowance. The Lord Chancellor (Lyndhurst) made the order prayed, upon the terms of the daughter settling what might eventually come to her as heir-at-law or next of kin of the lunatic; the Master to approve of a proper settlement. Nothing is said one way or the other about treating the allowance as an advancement. Similar orders had been made, one by Brougham, L. C., the other by Cottenham, L. C., in *Ex parte* Drummond, 1836, both unreported cases cited in the principal case.

1844. *Re* Grove, 13 L. J. N. S. Ch. 262.

This was a petition by the committee, sister and sole next of kin of a lunatic, for the increase of an allowance for the maintenance of the lunatic on the ground that there were illegitimate children of a deceased brother of the lunatic to be supported. "The Lord Chancellor (Lyndhurst) said that although the court would increase the allowance of a lunatic for the purpose of making a better provision for his illegitimate children, yet the circumstance of there being illegitimate children of a brother of the lunatic would not induce the court to increase the allowance."

Clearly it was here intended and understood that the expenditure should not be even indirectly upon the lunatic. Clearly, also, the test is that of the average man, for the Lord Chancellor disregarded a suggestion of the petition "that the lunatic would no doubt have

also contributed toward their support, if she was not incapable of doing so." The proposition of the case is that the court cannot be sure that the average Englishwoman would consider that her brother's bastards had any claim upon her.[1]

1844. *Ex parte* Lenehan and O'Geran. *Re* Hennessy, 1 J. & La T. (Irish Ch.) 29.

A creditor of a brother of the lunatic applied to have the brother's allowance impounded. Sugden, L. C., merely said, "I cannot give it to his creditors: it is given to him in order to enable him to live in a respectable manner."

Whatever ought to be done in ethics, it is clear that the average man would support his brother, and not clear that he would pay his debts. It follows that the creditors should have no standing, however large the allowance, and so are the subsequent cases. *Re* Weld, *infra*.

1845. *Re* Earl of Laneborough, 7 Ir. Eq. R. 606.

Here two children were entitled in remainder to one of the lunatic's estates. Their mother petitioned for an allowance for their maintenance out of a surplus apparently ample. The opinion of Sugden, L. C., is very short and unsatisfactory. It is as follows: "I cannot do this. It is out of all order and without precedent. It is to take one man's money and give it to another." The motion was unopposed, the committee appearing by counsel. It would seem that there must have been some special circumstances unreported, for the decision is certainly inconsistent with *Re* Creagh, *supra*, and with the clear English rule, which shows special favor to those in remainder. *Re* Sparrow, *infra*.

1846. *Re* Thomas, 2 Ph. 169.

This was a petition for a reference of the subject of the purchase of a West India estate worth £2000, for the lunatic's son, out of the *corpus* of the lunatic's not very large estate. Cottenham, L. C., "I never heard of such a thing. . . . If you can find any precedent . . . you may mention it again; but if there is none I shall certainly not make one." It would seem from the report that the *corpus*, having in view the lunatic's condition, could not safely be so diminished.

1847. *Re* Clarke, 2 Ph. 282.

Here the lunatic was tenant for life, remainder to his next

[1] But compare Bradshaw *v.* Bradshaw, 1 J. & W. 647, 1820. Increase of maintenance of an infant for the benefit of an illegitimate brother, born of the same father and mother, who was unprovided for.

brother. The surplus income was £2300. The lunatic had a father, mother, and sister in comparatively reduced circumstances, and two brothers who "had increasing families with incomes of about £230 each." Lord Lyndhurst had allowed £350 to the father, £350 to the next brother, £100 to the younger brother, and on the death of the father had, it appears somewhat obscurely, ordered the Master to divide the father's share between the brothers. Cottenham confirmed the Master's report with reluctance, disapproving of the extent to which the practice had been carried. A sum of £508 for permanent improvements he disallowed. "If," said he, "the remainder-man had been the son of the lunatic there might have been some ground for it; but I cannot sanction payments . . . which are to benefit his brother."

The case illustrates more than is usual the reluctance with which the court acts. The rule to-day would seem to be more liberal. *Re* Sparrow, *infra*.

1863. *In re* Croft, 32 L. J. (Ch.) 481.

This was a petition of a gentleman residing out of the jurisdiction of the court, the first cousin and one of the two only next of kin of the lunatic praying for an allowance out of the lunatic's surplus income. The lunatic had £1300 per annum; the petitioner was in great distress.

Knight Bruce, and Turner, L. JJ., on the authority of the cases in Meriv. & Myl. & Craig, granted the petition. Knight Bruce was inclined to decide the case on its own peculiar circumstances, without reference to authority and without making any precedent. £100 per annum was allowed to the petitioner, but the allowance was treated as an advancement.

1878. *Re* Bryce, 4 Victoria (Australian) L. R. Equity, 111.

This case is obscurely reported, neither the lunatic's means nor those of the petitioner, his wife, being stated. There was a fund in court of £2163, not the lunatic's whole property, out of the *corpus* of which the petitioner desired £250 with which to go into the millinery business. Molesworth, J., refused the request, but gave costs out of the fund. The lunatic when sane had allowed his wife £3 per week, and that allowance was continued.

1880. *Re* Harris, 49 L. J. N. S. (Ch.) 327.

This was a petition under the Lunatic Asylum Act, 1853, by the managers of a county lunatic asylum for the payment out of the property of the lunatic in court of arrears of maintenance since 1850. It was opposed. Cotton, L. J., held (1) that this was

simply a debt of the lunatic (*Re* Marman's Trusts, L. R. 8 Ch. D. 256); (2) that the court would therefore not order the payment of more than six years of arrears.

Here *Ex parte* Whitbread and analogous cases were not cited, nor was their principle urged upon the court. Had it been, it is submitted that the result might have been different, if (as does not appear) there had been a surplus of the lunatic's estate. For, it may be argued, the average man would not set up the statute of limitations against such a claim; even if the service had been professedly gratuitous, he would pay something, and that the court should do for him. As a creditor the petitioner has no case. It should not follow, as the court here assume, that he is remediless.

1882. *Re* Weld, 20 Ch. D. 451, C. A.

In this case a heavy allowance was made to the lunatic's brother for the keeping up of Lulworth Castle, the family estate, and for the maintenance of the brother and two sisters. The brother became bankrupt, having attempted to mortgage the arrears of his allowance. Jessel, M. R., said that though rendering no account, the brother received the money in a fiduciary capacity, and it followed that he could not make a valid mortgage, and, as a general rule, ought to be removed if he tried to. A bill for wines,[1] and other bills for supplies furnished to Lulworth Castle, were considered proper payments to be made out of the arrears of allowance. Nothing went to the mortgagee or the trustee in bankruptcy.

This seems to follow *Re* Hennessy, 1 J. & La T., 29, *supra*, p. 481. The nature of the interest which the recipient of such an allowance has, is discussed more at length below.

1882. *Re* Sparrow, L. R. 20 Ch. D. 320 (C. A.).

Here the petitioner, a clergyman aged twenty-eight, with an income of £100, and a curacy worth £120, was nephew and heir-at-law of the lunatic, entitled in remainder to the entailed estates, and one of many next of kin, several of whom opposed and insisted that such allowances were never made except with the consent of all concerned. They also said that if any allowance should be made it must be treated as an advancement, and insurance effected. The surplus income was £2000. Jessel, M. R., said that he could and would make the allowance of £500 prayed for; and, the petitioner consenting, the estate tail was ordered to be barred

[1] Per Jessel, M. R. "I am not sure that they are rightly called articles of luxury."

so far as to let in a charge of that amount, payable to the lunatic's executors, in lieu of treating the allowance as an advancement.

In 1884 the same case came up again, in *Re* Beridge, 50 L. T. N. S. 653, C. A. (Sparrow, the lunatic, seems to have had his name changed to Beridge in the *interim*). It appeared that the nephew's private income of £220 had increased to £300, and that he had married and had a son, thus practically destroying the chances of the next remainder-man in tail, who had opposed the previous petition, but who now assented. The petitioner prayed an increase of his allowance to £1000. Other next of kin opposed. Baggallay, L. J., said that the question was, "What would be a reasonable allowance to enable the nephew to maintain his position of a clergyman . . . without any cure, . . . a married man with one child, and who possibly may have more children." Cotton, L. J., dissented from any allowance, on the ground principally that so large an allowance charged by way of mortgage would leave the estate unwisely incumbered at the lunatic's death. Lindley, L. J., said that they did not differ in principle, and that to him some addition seemed only reasonable, considering the petitioner's prospects and "the large [family?] living we have heard of," to which, it seems, the clergyman might hope to present himself. The allowance was increased to £700.

Cotton's argument, although cogent, goes rather to show the viciousness of treating the allowance as an advancement, and of making such a beneficiary mortgage his future.

1882. *In re* Evans, L. R. 21 Ch. D. 297 (C. A.).

Here the lunatic had a surplus income of £975 after his maintenance in the asylum was provided for. The petitioner was worthy, being a clergyman eighty-one years of age, with eight dependent children and no means, reduced to indigence through no fault of his own by the Disestablishment of the Irish Church. He was one of eight first cousins and next of kin, another of the eight being heir-at-law. It did not appear that the lunatic had ever heard of him. Jessel, M. R., commented upon that fact, but said that it made no difference. He decided the case upon the absence of any claim, legal or moral, of a mere cousin. "South of the Tweed, that is not, I believe, considered to constitute a strong claim. . . . It has never been said that . . . it is to be presumed that it is a matter of interest to him [the lunatic] what becomes of his first cousins."

The only comment necessary to make upon this decision is, that it probably accurately expresses the extent of the average Eng-

lishman's feeling of obligation to his cousins. In a Scotch clan, as the Master of the Rolls intimates, a different obligation would be felt. Probably in this country, in New England at least, an average man who had an income of £925 ($4600), which he could not reasonably spend, would arrive at a different result. It may be doubted, therefore, whether an American court would follow *Re* Evans.

1884. *Re* Robinson, 27 Ch. D. 160 (C. A.); S. C. 53 L. J. Ch. 986.

An annual allowance of £60 by way of alimony, was after the lunacy of the husband provided for by an order in lunacy. The wife sold and her assignee mortgaged the allowance. The assignee and mortgagee petitioned for its payment to the latter. Baggallay, L. J., said that he preferred to treat it as an allowance in lunacy, given out of "charity," so to speak, the reason for which did not exist after assignment, and the payment of which, therefore, "ought no longer to be sanctioned." Cotton and Lindley, L.JJ., agreed with Baggallay on this point.

1888. *Re* Darling, L. R. 39 Ch. D. 208, C. A.

Here the gross income was £1647, the surplus income £857, after continuing certain annual allowances made by the lunatic while sane to three of his first ten cousins and next of kin. The Master recommended an increase of these allowances, and also allowances to three other first cousins, all six being in extremely narrow circumstances. Counsel attempted to distinguish the case from *Re* Evans, *supra*, on the ground that here there was no opposition.

Cotton, L. J., distinguished as a separate class "those cases in which an allowance has been made by the court in favor of a person who is the next successor to the lunatic's estate, for it is," he said, "the interest of every possessor of an estate that his successor should be educated and brought up in such a manner as to enable him to fulfil the duties attaching to the ownership of the estate." He added that *Re* Evens rendered it unnecessary to go into the question, and that consent or opposition should have no weight in any case. Fry, L. J., said: "I am by no means satisfied that if the lunatic were of sound mind he would have made any further allowances to these relatives." No allowances were made.

Fry's ambiguous remarks may or may not indicate that he thought any special generosity or penuriousness of the lunatic when sane ought to be taken into account. Cotton's point of

the "interest" which a landed proprietor has in his successor's fitness is apt to indicate the basis of the jurisdiction, for clearly it is not "interest," in any legal sense, in the man who will stand in his shoes, but rather the *custom* of ordinary and reasonable Englishmen to provide for their heirs or successors. Notice how the law hardens. After *Re* Evans, *supra*, and this case, first cousins have probably no chance in England. On the other hand, nephews have on the authorities a strong case.

These are all the English authorities.

In America the case of *Re* Willoughby, 11 Paige, 257 (1844), is the only one that goes into the matter at all, although cases like Hambleton's Appeal, 102 Pa. St. 50, and Halsey's Appeal, 13 Atl. R. 934 (see p. 477, *supra*), approach the line between Class B. and the principal class of cases. *Re* Willoughby, however, is explicit; and the matter is carefully considered by the distinguished Chancellor.

1884. *In re* Willoughby, a lunatic, 11 Paige, 257.

The case was a petition by the wife of a lunatic for an allowance out of his income to support her daughter by a former marriage. The wife was the lunatic's guardian or "committee."

The Chancellor, Walworth, said: "How far the court ought to go in making provision out of the estate of a lunatic for the maintenance of the relatives of such lunatic who have no legal claims upon him or his estate, has never yet been determined. It has frequently been decided, however, that where the income of the estate is large, so as to be much more than sufficient for the support of the lunatic and of those members of his family for whom he is bound by law to provide, the court may make an allowance out of such income to his near relatives who are in need of assistance. This is done almost as a matter of course in reference to the children of the lunatic or other descendants who are presumptively entitled to his estate in case of his death, and where there is but little or no hope of his recovery. I know such orders have been made by this court within the last fifteen years in three or four different cases, where the estates were large, and the incomes much more than sufficient for the support of the lunatics and of all those who had a legal claim upon such lunatics for support and maintenance. But my present recollection is that in all those cases I required the adult children, who were competent to support themselves, to give a stipulation that the amounts advanced to them respectively should be brought into hotchpot upon the death of the lunatic, if any part

of his personal estate should come to them under the statute of distributions. This principle of considering the allowance as an advance, to be brought into hotchpot in distribution, has not, however, been extended to children of the lunatic who were sickly or decrepit, so as to give them a special claim upon the estate of the lunatic. The court, in such cases, acts for the lunatic, and in reference to his estate, as it supposes the lunatic himself would have acted if he had been of sound mind."

The Chancellor made no allowance, being satisfied that the step-daughter was not deserving, but expressed his entire conviction that the law would warrant one in proper circumstances, and cited *Re* Earl of Carysfort (*supra*, p. 479) with approval.

1891. *Re* S. T. H. Suffolk, Mass. probate files.

In this case, the lunatic being amply provided for, an allowance of $350 per annum was made to his father. There is difficulty in explaining this upon any other ground than that set forth as the *ratio decidendi* of the cases above. An account of the case is given at length in a note.[1]

[1] *Petition.* Repectfully represents W. B. D. that he is guardian of S. T. H., an insane person heretofore committed by said court to the McLean Asylum. That said ward has no wife, children, issue, or mother living. That his only heir-at-law apparent or presumptive is his father, L. F. H., of . . . who is aged, and in destitute circumstances, and in feeble health. That the only heirs-at-law apparent or presumptive of said L. are the following: [Two sons beside the lunatic; seven children of a deceased daughter.] That the estate of said ward, so far as can be ascertained, will be more than sufficient for his suitable maintenance during his life, and that it is his desire that some suitable provision may be made for the support of his said father. Wherefore your petitioner prays that he may be authorized to pay to said L. F. H. . . . for his support a sum not exceeding $350 per year, payable in monthly instalments, until further order of this court, and that the same may be allowed your petitioner as a charge against the estate of his ward in his accounts with said estate. — W. B. D., Guardian.

Assent of two other sons and the one of the seven grandchildren who was of age.

Decree, — "And it appearing to the court that it is the desire of said ward and for his benefit that said provision be made for the support of his father, it is decreed," &c. [following prayer]. — John W. McKim, March 16, 1891.

A man's father is not a member of *his* family.

By P. S. ch. 84, § 6 (Stat. of 1793, ch. 59), kindred of *paupers*, ascendants or descendants, living in this State, and of sufficient ability, shall be bound to support such paupers. By §§ 7 ff. proceedings in the Superior Court are provided, and that court can assess such weekly sum as it shall deem reasonable and sufficient upon the said kindred. This applies apparently only to persons standing in need of public relief, Hutchings *v.* Thompson, 10 Cush. 239; cf. Groveland *v.* Medford, 1 Allen, 23; and little if any more than a pauper's allowance seems to have been. In Templeton *v.* Stratton, 128 Mass. 137, $1.50 per week was assessed. The principal case would, therefore, seem to be a precedent of the kind of allowance discussed in this article.

For this case we are indebted to the kindness of Hon. W. B. Durant of the Boston bar. It may be mentioned that the allegation of the ward's desire is not to be understood as indicating any interval of sanity.

There is one recent English case which does not properly belong in the list,[1] and which yet deserves special mention. In *Re* Whitaker, L. R. 42 Ch. D. 119 (C. A. 1889), a sudden attack of *angina pectoris* had cut off a merchant who was in the act of changing his will. As a result Whitaker, already a rich man, got £400,000 which the testator intended for the petitioner. Recognizing some imperfect obligation, he gave the petitioner a voluntary promissory note for £50,000, and had, when he became insane, paid three yearly instalments of £5000 each. The beginning which he had made, and his expressions in semi-lucid intervals, showed that he had had a clear intention to pay the whole sum, and this intention the court carried out, repudiating all the while every suggestion of legal obligation. "It is," said Lindley, L. J., "a debt of honour, not in the sense of a gambling debt, which I consider a debt of dishonour, but a debt of honour which this court ought to recognize." Accordingly the court ordered payment out of the lunatic's *principal*. How far they would go in cases where they had no sane intention to guide them, one cannot of course tell. It would take a strong case; but, given a strong case, there seems to be no good reason against such payments,[2] and the court has crossed the Rubicon, and faced the bugbear of "giving away another man's money," in paying out Whitaker's principal on such a claim as this.

III.

In the conventional standards of the so-called imperfect obligations, which are the standards that the courts are really applying in these cases, the claims of near kindred undoubtedly stand high. But the normal man certainly does not for this reason limit his benevolence to his relations, and *Ex parte* Haycock, *Re* Earl of Carysfort, and *Re* Willoughby, *supra*, show that the court will impose no such limitation. It would be equally an error, however, to infer that the court in these cases acts like a board of charity, to canvass the merits of any person who thinks that he deserves a

[1] It should be in class B, *supra*.

[2] Suppose, for example, A has an aged mother, and, expecting to survive her, makes his will, leaving all his property to a clergyman. Suppose the clergyman, who was expected to devote the money to purposes of general benevolence, becomes a lunatic before learning of his legacy. Could not the court keep the mother out of the poorhouse? And if the lunatic's other property would keep him from want, would the court shrink at spending the principal of this legacy on the testator's mother if it became advisable to do so?

share of the lunatic's surplus income, and it is obvious that no court could safely extend its jurisdiction so far as to carry the test of the normal man to its logical extreme.[1] The decisions, however, furnish no authoritative rule for drawing the line. On the one hand, it is clear that the class of possible beneficiaries is not limited to relatives of the lunatic; on the other hand, it seems equally certain that the applicant must bring strong proof to move the court. For, as Bowen, L. J., said in *Re* Darling, *supra*, "jurisdiction to make allowances . . . ought to be exercised with the utmost jealousy." And one may tentatively suggest, as a general rule, that wherever the applicant is a near relative, legitimate or illegitimate, or where he has at some time been in intimate personal relations with the lunatic, the court may, in proper circumstances, make the allowance. In extreme cases the court might go farther, but should tread such paths with caution and jealousy.

The rules for determining what are proper circumstances to entitle an applicant to an allowance are equally vague. Absolute indigence is clearly not essential. On the contrary, an heir-at-law, the next in remainder, or the brother who keeps up a family estate (cf. *Re* Weld, *supra*) may be kept in luxury. What would be an ample allowance for a day laborer (*Re* Croft, *supra*) has not been increased because an adequate allowance for a clergyman was larger. (*Re* Blair, *Re* Sparrow, *supra*.) In *Re* Blair £150 each was given to two nephews with incomes of £300. In *Re* Sparrow the applicant finally got £700 per annum, bringing his income up to £1000; and the general test seems to be there well laid down by Baggallay, L. J. "What," he asked, "would be a reasonable allowance to enable the nephew to maintain his position?"

Another question which has arisen deserves serious consideration. Under what circumstances is assistance rendered in the exercise of this jurisdiction to be treated as an advancement, and brought into hotchpot if the lunatic (as most lunatics do) dies intestate?

The law of advancements in England is still determined by sec. 5, chap. 10, of 22 & 23 Car. II., the Statute of Distributions, and by the judicial interpretations of that Statute. Sec. 5 reads, . . . "And all the residue by equal portions to and amongst the children of such persons dying intestate . . . other than such child or children [not

[1] For instance, a lunatic may have given annually in charity $1000, each year to a different charity. The court cannot very well continue that, it would seem.

being the heir-at-law] who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made. And in case any child other than the heire-at-law who shall have any estate by settlement from the said intestate or shall be advanced by the said intestate in his lifetime by portion not equall to the share which will be due to the other children by such distribution, . . . then so much . . . to be distributed to such childe or children . . . as shall make the estate of all the said children to be equall."

In interpreting this section the English courts have had occasion to lay down certain rules for determining what allowances or gifts made by a parent in his lifetime to his children are to be regarded as advancements. These principles are well stated in Boyd *v.* Boyd, L. R. 4 Eq. Cas. 305 (1867), and Taylor *v.* Taylor, 20 Eq. Cas. 155 (1875). In the first case Page Wood, V. C., said, "In short, whatever sum is paid for a particular purpose which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advancement." In the later case (Taylor *v.* Taylor) Jessel, M. R., commenting on this exposition of Vice Chancellor Wood, said that by "particular purpose" was meant something given to establish the child in life, like a marriage portion. Accordingly he held that the following payments were advancements, viz., (1) an admission fee to the Inns of Court; (2) the price of a commission and outfit of a child entering the army; (3) cost of a "plant" and machinery to start a son in business. But he held that the payment of an army officer's debts, and an annual allowance to a clergyman for household expenses, were not advancements.[1]

These remarks show clearly enough that stipends for maintenance payable out of income are not advancements, in the absence of evidence of direct intention to make them so; and the general inquiry clearly is, what is it reasonable to infer from the mere fact of a gift of the kind under the given circumstances? It is difficult to understand why the same test should not be applied in dealing

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[1] See also the note to Pusey *v.* Desbouvrie, 3 P. Wms. p. 316; Swinb. Pt. 3, § 18, pl. 19; Bac. Abr. tit. Executors and authorities in last American ed. of Williams on Executors.

with allowances made by the court out of a lunatic's surplus. The court represents the lunatic, and should act as he would under like circumstances. Therefore if the advancement cases show that a sane person would not be reasonably expected to treat an allowance as an advancement, why should the court adopt a different rule in lunacy cases? A practical reason is not far to seek. In fact a lunatic's surplus rolls up for the benefit of his next of kin, and their expectations may be disappointed. But what shred of right or claim, we ask with deference, can they have to demand that the surplus shall roll up? The court watches jealously to see that they do not economize on the lunatic's maintenance,[1] and why should not the rule be the same here? Another reason, which perhaps has had more weight, is that some judges, frightened at what seems to them audacity in exercising this jurisdiction, try, as soon as they have done anything, to neutralize its effect; and so in their decisions the Court of Chancery, instead of acting as the wise guardian, carrying out the lunatic's wishes, seems furtively to make a loan out of funds in court, and make it payable out of the borrower's expectations, — a true post-obit, since the next of kin of to-day may not survive the lunatic.

Take as an example the case of *Re* Frost, L. R. 5 Ch. App. 699 (1870). There the court continued allowances made by the lunatic to needy relatives. The surplus was large, yet the allowances from their size and nature might almost have been made by overseers of the poor. James, L. J., nevertheless, without giving reasons, said that the allowances must be treated as advancements.

Now, no one with so large a surplus income as that of this lunatic would consider such allowances as advancements to be deducted out of the recipients' legacy or distributive share. And so especially where, as here, the allowances had been begun by the lunatic, any reason for treating the payments as advancements seems to be wanting.

In *Re* Willoughby, *supra*, Chancellor Walworth seems to have thought that these allowances would be treated as advancements where possible, except in the case of "children who are sickly or decrepit, so as to give them a special claim on the lunatic for support." With deference it is submitted that this is at least no improvement on the English rule. In any case the recipient

[1] Pope, Lunacy, p. 147 and note *f*, 2d ed. 1890.

should have what an ordinary person, standing in the same relation to him as the lunatic, would give him; and if a sane man would not treat such assistance as an advancement, it should not be made one by a court. We have, perhaps, dwelt unduly upon this topic of advancements, but thinking it, as we do, the one serious mistake in the exercise of the jurisdiction, we could scarcely do otherwise.

IV.

This disposition of the lunatic's income, serving as it does to substitute a wise expenditure for senseless accumulation, and to carry out those imperfect obligations which are none the less real because their sanction rests rather in the customary ethics of the community than in any legal remedy upon them, deserves to be consistently followed out and developed in the future. What its future will be one does not venture to predict; but a few considerations may not come amiss. Where, for instance, in the law are we to classify the interest of the recipient? An income which one draws regularly from a fund in Chancery, and which can only be stopped by an order in court after due proceedings, is practically more than mere charity. But how much more? The recipient in England takes it free from all claim of his creditors, *Re* Hennessy, *supra*, p. 481; yet it can be settled to a wife's separate use. *Re* Drummond, *supra*, p. 478. Even arrears cannot be assigned, *Re* Weld, *supra*, p. 483; Robinson, *supra*, p. 485, or mortgaged; and such action is perhaps a cause for the withdrawal of the allowance.

These characteristics seem to show that it is about as far on one side of a discretionary trust, like that in *Re* Coleman, 39 Ch. D. 158 (1888), as Broadway Bank *v.* Adams, 133 Mass. 170 (1882) is on the other. Yet in the fact that it puts money, sometimes large sums in regular instalments, into the absolute control of a man whose creditors may, for all the difference it would make, be starving, it more closely approaches Bank *v.* Adams. How far, one may ask, would the theory of Bank *v.* Adams be carried out? For instance, might not some American court which acted in its other decisions upon the principle that an estate to live on is an estate to pay one's debts with, make the aid conditional upon the annual payment by the recipient of some part of his honest debts? — saying, "The normal man might do this; assuming that he would, we refuse to lend our aid to such proceedings." Just as a court cannot, in the nature of the case, be as generous as the normal

man would be, so it might be able, on the other hand, to improve on his morals. Yet, so far it has not attempted to do so.

Not the least interesting thing in this whole bit of law is the glimpse which it gives us of our friend, the Average, Reasonable, Prudent Man. In negligence cases his prudence has been a reproach to us all. We know that his investments as a trustee have been wise beyond reproach. We have seen with wonder that "his conduct under given circumstances is . . . always the same."[1] But here he is spending his income, and here, therefore, for once we feel that he stands before us as a brother. There is something refreshing in the way in which we hear of his opinion of first cousins. "South of the Tweed," says Sir George Jessel, it is not to be "presumed that it is a matter of interest to him what becomes of his first cousins." They may go to the poor-house.[2]

William G. Thompson.
Richard W. Hale.

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[1] Holmes, Com. Law, 111.

[2] Compare Code Nap. § 510. Les revenus d'un interdit doivent être essentiellement employés à adoucir son sort, et à accélérer sa guérison. § 511. Lorsqu'il sera question du mariage de l'enfant d'un interdit, la dot ou l'avancement d'hoirie (advancement of heir's portion) et les autres conventions matrimoniales seront réglés par un avis du conseil de famille, homologué par le tribunal, sur les conclusions du procureur du Roi. See Tripier's edition of the Codes.